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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-450

BELLINGHAM STEVEDORING COMPANY,

*Petitioner,*

—v.—

DAMPSKIBSAKTIESELSKABET, *etc., et al.*,
INTALCO ALUMINUM CORPORATION and
AMERICAN METAL CLIMAX, INC.,

*Respondents.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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AMERICAN METAL CLIMAX, INC.,
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—and—

INTALCO ALUMINUM CORPORATION, *et al.*,
*Respondents.*

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth District, filed in the above case on March 24, 1972.

## Opinions Below

The opinion of the United States Court of Appeals for the Ninth Circuit printed in Appendix A hereto is reported in 457 F.2d 889. It unanimously affirmed the final judgment of the United States District Court for the Wsetern District of Washington, Northern Division, entered on November 21, 1969 and printed in Appendix "B".

## Jurisdiction

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on March 24, 1972.

A petition for rehearing ~~in banc~~ was timely filed on April 4, 1972 and denied on June 12, 1972. A Petition for Re hearing en banc was denied and filed on August 7 1972

The jurisdiction of this Court is invoked under 28 USC (Section 1254, Sub-section (b)), i.e. where a Court of Appeals has in effect by its decision sanctioned a departure by the trial court from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

## Questions Presented

a) Whether the words and actions of the Trial Court without any justification, at the opening of the trial, were calculated to and in fact did deny the defendant its basic, constitutional and civil right to be represented at the trial of this action by counsel of its choice.

b) Whether there was any evidence whatsoever to sustain the decision of the District Court or whether the only factual evidence presented at the trial was disregarded

and the decision founded on speculative deductions of experts based largely on a survey of the damaged crane, from which plaintiff's experts were excluded from participation.

c) Whether Jebsens, the Time-Charterer, and American Metal Climax, the Voyage-Charterer, cannot recover against Bellingham.

## Statement of the Case

These two actions were instituted initially for approximately $55,000 on November 30, 1967; several months later, after a survey of the damaged crane by experts of the respondent, Italco, in which petitioner's surveyor was present and attempted to participate but was excluded from participation, Italco filed a cross-complaint in the sum of $123,533.08 against petitioner.

Because of this escalation of the claim to major litigation and because the respondent Italco and the other parties were all represnted by admiralty counsel of long standing, petitioner designated Samuel C. Otto, senior admiralty counsel from New York to proceed to Seattle to act as chief counsel because of his dual qualifications as knowledgeable in the field of forensic engineering and his broad admiralty experience.

As will appear from the record, the Court was incensed at the appearance of senior admiralty counsel and his two assistants from New York in his courtroom and incredibly refused to permit him to act as chief counsel for petitioner. In fact, permission to participate at all was, as the following will establish, made wholly dependent upon the acquiescence of petitioner's local counsel with whose prestige the court seemed more concerned than with the right of petitioner to be represented by counsel of its choice.

## REASONS FOR GRANTING THE WRIT

### POINT I

**The Circuit Court in Its Duty of Supervision of the Trial Court Should Have Reversed Its Decision Because of the Unwarranted and Arbitrary Refusal of the Trial Court to Permit the Defendant-Appellant to Be Represented at This Trial by Counsel of Its Choice.**

The late distinguished Justice Black has stated so eloquently that the right to be represented by counsel of one's choice is a basic and fundamental right of all litigants. This right was denied petitioner of record in this case.

This is not a situation of a flare-up between Court and counsel in the middle of a tense trial. There had been no testimony taken and upon the attorney of record moving Samuel C. Otto and two associate attorneys, all from New York, for association as active co-counsel in the trial, the following incredible and offensive remarks emanated from the bench:

> "The Court: I am amazed that your client finds it necessary to send three lawyers out here clear across the country to participate in this case. I can't understand it. What is your feeling about this, Mr. Zinn?
>
> Mr. Zinn: I'm very happy to have any assistance they would give.
>
> The Court: It kind of looks to me like you are getting into a position of heads I win, tails you lose, but if that is the way you want, I will permit these gentlemen to associate with you.
>
> Mr. Zinn: Thank you, your Honor.
>
> The Court: I want you to understand, though, Gentlemen, that you are going to have to accommo-

date yourselves to my dates and my times. That is one of the big troubles I have had with outside counsel in the past, they are used to proceeding at different hours and they have busy calendars in the place that they come from and want continuances, and that is one of the reasons that I have objections to having outside counsel associate in cases here. It has never worked out well. But with that understanding, and I am looking to Mr. Zinn as chief counsel at all times, all right."

This judicial tongue-lashing administered by the Court for the edification of designated chief counsel of petitioner and his two associate lawyers, solely for being "strangers within the gate", constituted judicial constraint of major proportions and rendered ineffectual, for all practical purposes, the independent active participation of the designated chief counsel, Samuel C. Otto and his two New York admiralty lawyer-assistants lest their full participation in the trial of the action further enhance the announced predeliction of the Court against "outsiders" in his Courtroom, which his words indisputably established that he regarded as his personal judicial fief, in which "outside" lawyers, to say the least, were not welcome. A basic and inalienable right to be represented by counsel of its choice was summarily and without cause denied the petitioner.

That expert admiralty counsel's participation in and direction of the case was required for the petitioner to have had a fair trial is abundantly established by the Record.

The court may mark an apparent anomaly in that: (a) Bellingham is relying on the strong inference drawn in admiralty cases against one who does not permit a survey by opposing parties and, yet, (b) in the pre-trial order,

Bellingham's counsel of record stipulated the correctness of the damages (R. 143).

Counsel of record for Bellingham in the argument of the Motion for Reconsideration at the trial argued in favor of drawing the inference against Intalco, indicating that he had been "boxed into" stipulating damages at pre-trial because he had no controverting evidence to present at the time of pre-trial.[1]

The regressive and alienating conduct of the trial court ill comports with the open door to all counsel policy in the Federal Courts in which maritime lawyers have heretofore been at home in any District or State in the Country, and the reversal of the Circuit Court's affirmance of the trial court's judgment is urgently required so that a trial, in which petitioner may be represented by counsel of its choice may be held at which the rights of all the parties to the action may be impartially determined.

The Court had no animadversion whatsoever to the legion of local counsel representing the various parties at the counsel table including the chief counsel for respondent, Intalco, who was prior to the Court's designation to the Federal Bench, one of his law partners (see Appendix, Exhibit C).

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[1] "Mr. Zinn: The other point I wish to make, your Honor, is this: We were more or less at the mercy of the Intalco people on this question of damages and in effect were boxed into admitting in the pretrial order the amount of the Intalco damage. I say that for this reason: Guy Williams, the crane operator, testified that he was not permitted to go up into the cab immediately after the accident happened. Dennis Brown, one of our experts, was permitted to testify that he went to Ferndale I think after the accident occurred and was denied access to the pier. He did get to go back some four or five days later. Of course by that time, everything had been pretty well restored to its original condition. Intalco personnel swarned all over the thing, so there wasn't much to find after the fact, so to speak." Transcript hearing on argument of Motion for Reconsideration at page 8 (See appendix).

## POINT II

**There Is No Credible Evidence Whatsoever of Negligence on the Part of Defendant-Appellant But Only Speculation by Experts Largely Based on a Survey of the Damaged Crane From Which Petitioner's Expert Was Excluded.**

The captioned actions, "In Admiralty No. 300" and "In Admiralty No. 308," arose out of the same casualty which was caused by the falling of the boom of a dock crane on to the SS TROJA on December 1, 1966. The actions were consolidated for trial and all other purposes.

In Number 300, the partnership Wilh. Wilhelmsen, composed of Dampskibsaktieselskabet Den Norske Afrika Og Australieline, Wilhelmsens Dampskibsaktieselskab A/S Tonsberg, A/S Tankfart I, A/S Tankfart IV, A/S Tankfart V, and A/S Tankfart VI (Wilhelmsen), owner of M/S TROJA and A/S Kristian Jebsens Rederi (Jebsens), time charterer of TROJA, brought action against:

(a) Intalco Aluminum Corporation (Intalco) lessee of a dock and of the crane thereon which was used by Intalco at Ferndale, Washington, for the discharge of bulk alumina;

(b) Bellingham, who furnished the operator of the crane pursuant to a stevedoring contract with Intalco.

Intalco impleaded McDowell-Wellman & Co. (McDowell) as a third-party defendant in Number 300. McDowell had participated in the design and had fabricated the crane and supervised the installation of the crane on Intalco's premises.

In Number 308, American Metal Climax, Inc. (American Metal), voyage subcharterer of the TROJA, brought ac-

tion against Bellingham for damage sustained when the crane boom fell upon TROJA. Bellingham impleaded Intalco as a third-party defendant; and Intalco cross-claimed against Bellingham and McDowell to recover crane-repair costs.

A pretrial order was entered which set forth the admissions and contentions of the parties (R52-79; R142-145).

The M/S TROJA arrived at Ferndale, Washington, and moored at Intalco's dock on or about November 28, 1966 to discharge its cargo. The discharge of the cargo was being accomplished by the use of the dock crane. During discharge, this crane was operated by various crane operators, one of whom was Mr. Guy Williams (Williams). The crane was under lease to Intalco.

Williams had been a longshoreman by occupation since 1961, working out of a local union hall (239). He received a crane operator's certificate in 1965 for which there was a prerequisite of 240 hours on-the-job training under an instructor. He held that certificate at the time he was operating the crane at the Intalco pier in discharging the TROJA (241). He had operated cranes in Bellingham and all over the Puget sound area, including cranes similar to the Intalco crane in question. He estimated that 40% of his working life since he commenced training in crane operation in 1965 had been operating cranes and that the average number of hours that he was employed during a year would be approximately 2,000 (240-241).

Williams was a member of the Labor Relations Board Committee in his local union and a member of the Governor's State Safety Board. He was also a union delegate on a coast-wise committee represented in the International Union (241-242).

Williams had received instruction in the operation of the specific crane being used to discharge the TROJA at the Intalco dock at Ferndale. Instruction was given by a representative of McDowell with representatives of Intalco present (243).

The crane involved in the accident was put in operation at Ferndale in the Spring of 1966, and Williams had operated said crane since then working all vessels, except one or two, that had called there to be discharged, although not always as a crane operator (244-245).

The crane was boomed up and secured in an upright position at 1650 hours on December 1, 1966. This fact is confirmed by Intalco's witness, Ralph C. Cramer, an engineer employed by Intalco, upon consulting Intalco's log book (193), as well as by Williams (273). No attempt was made by Intalco to prove that its log or Cramer's testimony was incorrect.

Williams, according to Cramer, boomed up the crane and secured same in an upright position because:

(a) The wind was very severe. *The crane swayed excessively* (194) in the severe gale force wind which was then blowing, and;

(b) The crane could not be operated by reason of repairs then being made by Intalco to the bucket-lift mechanism (193).

At 1700 hours, the longshore crew went home and Cramer provided transportation for them to the end of the pier (193, 195).

At 1705 hours on December 1, 1966, *fifteen minutes after* the boom had been secured in an upright position, the boom fell onto the vessel TROJA (Pretrial Order, R74).

*After* the crane had been "boomed up" and *before* the boom fell, Williams reported his reasons for "booming up" to Cramer, who approved same (194). At that time the boom was properly latched and everything was secured in a vertical position according to Cramer (195).

The boom of the crane while in a working position is normally horizontal. The ore bucket travels along with the boom until it is positioned over the hatch of the vessel where it is caused to descend into the vessel hatch to pick up ore and is then caused to be lifted and returned to the hopper for discharge (174).

Because the boom in its horizontal position is extremely sensitive to wind, the operators have "standing instructions" to "boom up" to a vertical position against the king post when there is a strong wind blowing (270).

A wind force measurement instrument causes a siren to blow when the velocity of the wind reaches 50 miles per hour and causes all power on the crane to be automatically shut off and prevents any movement of the crane when the wind reaches 60 miles per hour (253).

On December 1st the weather was *extremely bad.* The siren sounded *frequently* during the last hour or two before the boom was secured upright by Williams until Intalco's chief engineer, Cramer, finally pulled the fuses (224). They had to sit for quite a period of time and wait for the wind to die down before the crane could be moved (254), and Cramer was *coerced* by the bad weather conditions into leaving the pier at about 1700 hours (195).

The siren sounded more than once during the fifteen minute interval between the securing (at 1650 hours) and the falling of the boom (at 1705 hours) (279).

The drum, upon which the twin cables which raised and lowered the boom were spooled, was operated by a con-

stant speed motor whose speed was such that it required 7.43 minutes *altogether* to unwind and rewind all said cable on the drum. This was the testimony of Homer B. Lupton, an engineer called as a witness by Intalco and American Metal (473). This was confirmed by Bellingham's expert, Ty Fiske (691). Said 7.43 minutes was the total time lapse required for the boom to proceed from a vertical position to the horizontal and back to the vertical, or for the drum to fully unwind and fully rewind the cable. One of the cables apparently ran off the drum and broke upon rewinding but the other cable rewound on the drum lifting the boom (566-567).

Williams testified that it took about 3½ to 4 minutes to lower the boom from vertical to horizontal and the same time to raise it from horizontal to vertical (273, 274).

The crane was equipped with a safety device, sometimes called a "dead man" control, which prevented the boom from being elevated beyond a certain point near the limit of its upmost travel unless a "bypass" button and the "up" button were simultaneously pressed; but the crane was *not equipped* with a similar safety device which would prevent its downward travel from the secured upright position even though such safety device could have been easily, quickly, and inexpensively installed. This was the undisputed testimony of Bellingham's expert witness Henry Brown (418).

As the crane was designed and equipped the boom motor would turn in a down direction by *momentarily pressing* the "down" button (417), even when the boom was secured in an upright position in the safety dogs and latches, and which admittedly was a critical position of the boom.

Intalco's chief engineer, Cramer, had supervised the engineering and approved the design drawings of the crane

(167) and did more engineering on the crane than anyone else outside of McDowell and the Bechtel Corporation people (173) despite the fact that he had had no prior experience in design and drawing specifications of cranes (207).

No opportunity was granted to Bellingham to inspect the damages before repairs were made to the crane.

Repairs were started after the accident (204). Nevertheless Williams, who returned to the crane immediately after the accident, and started to walk toward the crane, was told by one of the maintenance men, "Don't go in there, don't go in there, there may be live wires around" (273).

Bellingham's expert, Brown, had to make two trips to the Ferndale plant before he was permitted entrance. On the first occasion, December 2, 1966, he was refused entrance to the plant, despite the fact that repairs were already underway at the time. About four or five days later he returned and was, for the first time, permitted to make an inspection (413).

Just prior to the trial, Bellingham's expert, Duncan, was refused the right to go into the plant and inspect the motor starter (408).

Power to the crane had been shut off within minutes after the accident. Intalco's electrical superintendent Pfeiffer was in the office of the chief engineer of the Ferndale plant when the accident occurred and was informed of the accident by a telephone call from the pier, arrived there ten minutes after the telephone call, and within five minutes opened the main breaker to the motor generator set and shut off all power to the crane (452, 453, 455).

The above stated facts are not controversial. Williams' testimony, summarized below, is not directly controverted

but Intalco and McDowell argued that his testimony was not consistent with the opinions of the experts.

Williams gave a detailed statement to representatives of Intalco several days after the accident; he was examined at length before trial, more than one year prior to the trial and was examined at length upon the trial.

His statement, his pretrial testimony and his testimony upon the trial are consistent throughout and no serious attempt was made to impeach his credibility.

The trial court relied solely and entirely on the existence of "inconsistent physical facts" which rebut Williams' statement and undisputed direct testimony.

Williams testified in detail concerning exactly what he did in raising the boom from the horizontal and securing same in a vertical position against the king post on the afternoon of December 1st as follows (257-268):

a) He released the mechanical hand brake at the motor drum.

b) He proceeded from the motor room to a higher station where the boom hoist motor controls are located.

c) He pressed the "up" button until the upward movement of the boom was automatically stopped by an upper limit safety control switch. (At a point below the safety dogs which were about a foot below the maximum limit of upward travel of the boom.)

d) He then simultaneously pressed the "by pass" button and the "up" button until the boom had been raised above the safety dogs which serve to secure the boom in its upright position.

e) Williams then pressed the "down" button until he heard the boom click into the latch or safety dogs.

f) Williams finally pressed the "stop" button.

g) He then tested the lever which serves to raise or lower the safety dogs and ascertained that the boom was secured in the safety dogs and the cables were not slack.

h) He knew the boom was secured in the dogs when the lever did not move them when it was pressed.

i) Williams then returned from the higher boom-hoist control station to the motor room, set the mechanical hand brake and personally knows that the motor was *not moving* (266-267).

j) *After* all of the foregoing, Williams, at 1650 hours descended to the dock level.

On the dock, Williams met Cramer and told him why he had boomed up the crane and Cramer agreed with and concurred in Williams decision to boom up the crane.

At 1705 hours, 15 minutes after the boom had been secured, the boom fell.

The Court erred in holding that the speculative deductions of experts constituted uncontroverted physical facts.

Despite Williams' positive testimony, and the fact that *it admittedly took but 7.43 minutes* for the boom and its motor to make one complete cycle from the upright position of the boom to the horizontal and back to the vertical, and the proved fact that the accident happened 15 *minutes after* the boom was secured, the trial court theorized:

a) That Williams had failed to press the stop button after he had lowered and secured the boom in an upright position in the dogs; and

b) That Williams had failed to set the mechanical hand brake.

The veracity of crane operator Williams has nowhere been questioned. He was frank, articulate and honest. The trial court could only suggest in its opinion that Williams might honestly have been mistaken in believing he had performed the operations he testified to (R181).

The record herein cannot support a finding of honest mistake. Williams' definite and certain, positive and detailed testimony was either correct or it was false.

He was precise as to what he did on December 1, 1966, namely: that he pressed the "stop" button when the boom was in the dogs, tested the "dog release lever," looked at the falls to see if there was any slack in the boom cable, went down to the motor room, set the mechanical brake on the winch drum, and *personally knows* that the motor was *not* running (266-267).

Williams frankly admitted he did not disconnect the motor generator. He explained how he deliberated and then decided to leave the motor generator connected because of work then being done by Intalco on the bucket lift mechanism (280).

Had Williams failed to press the stop button:

> The slackening and unwinding cable caused by the motor turning downward would have been immediately and unmistakably noticeable when Williams tested the lever which raises and lowers the safety dogs.
>
> The cable on rolling from the drum in the motor room would have been immediately and unmistakably noticeable by Williams when he proceeded thereto from

> the higher station where the boom hoist motor controls are located. The turning of the motor and drum in the motor room would have been immediately and unmistakably noticeable by Williams when, as he testified, he set the hand brake . . .

and Williams could not have been honestly mistaken but would have been intentionally untruthful when he testified (266, 267), *"I personally know that the drum was not moving."*

The accident would have had to happen at 1657.43 hours instead of 1705, since, as the experts of all parties admit, and there has been no contradiction thereof, the complete unwinding and rewinding of the boom hoist cables took only 7.43 minutes (473, 474, 691) after the boom was secured in an upright position at 1650 hours (193), and which would have had to be 7.57 minutes *before* the time the boom fell at 1705.

There was no factual proof that Williams had not set the mechanical hand brake; the hand brake was not designed to, nor would it, stop the motor under power (575, 576).

*After the accident the hand brake lever could not be moved* and a component of the hand brake system had been moved out of position (577); and the metal bed plate upon which the hand brake rested and to which it was secured was found immediately after the accident to have been severely distorted, showing that it had been acted upon by a large force that had deformed the steel (579, 580, 581); and the hand brake could not be moved in any direction until the frame was cut and straightened (199).

After demonstrating that the brake system had been deformed by a great force, it was compounding one inference or "theory" upon another inference or theory to presume

or expect that the hand lever of the brake would be in the same position after the accident that it had been prior to the accident.

The trial court, in its Opinion, stated that while it did not believe Williams to be a dishonest witness, it thought his testimony could be rejected as inconsistent with the "uncontroverted physical facts" (R181).

Speculative deductions of experts are not facts. The court was mistaken: it was not relying on uncontroverted physical facts but conjecture and speculations of experts based on physical facts which Intalco kept jealously to itself by excluding petitioner's expert from the scene of the accident until it had made its own repairs and changes in the evidence.

The doctrine which permits unimpeached testimony to be rejected when there is a conflict with facts established by the evidence is qualified by the rule that the physical facts must be irrefutably established and permit of only one deduction and that the testimony of a seemingly honest witness is not to be rejected because of conflicting evidence.

This rule is confirmed and stated in the case of *Nethom* v. *Berenschot,* 89 N.W.2d 289, 3 Wis.2d 585 (Sup. Ct. Wis. 1957), at page 589:

> ". . . appellant argues that the location of all of the debris from the accident on the south half of the highway renders Schmechel's testimony incredible, under *Stetad* v. *Cooperative Insurance Mutual,* 256 Wis. 261, 40 N.W.2d 552, and similar cases in which we have held that established physical facts may destroy the credibility of testimony inconsistent with such facts. We have also held, however, that the probative value of testimony is not destroyed by physical facts

> unless the physical facts are irrefutably established and permit of only one deduction. *Blom* v. *Kumbler*, 275 Wis. 227, 235, 81 N.W.2d 528."

Here the physical facts which the court must have relied upon as irrefutably establishing and permitting of only one deduction are impugned and rendered questionable by the fact that no opportunity was granted by Intalco to Bellingham to inspect the damages before the repairs, which were started immediately after the accident, and by the fact that Williams was not permitted to view the damage immediately after the accident; that Bellingham's expert, Brown, was refused entrance into the Ferndale plant on the day following the accident and was first permitted to inspect the crane four or five days later; and that Bellingham's expert Duncan was refused the right to go into the plant and inspect the motor starter just prior to the trial.

It may not properly be said that Intalco's *version* of the facts, which the court held to be "uncontroverted," are indeed the real facts when Bellingham was refused permission to inspect the damaged mechanisms before they were altered.

Rather, it should have been held that Intalco's refusal to permit inspection before alteration of the mechanism was "guilty knowledge" of the cause of the accident. *Wong* v. *Sivier*, 267 F.2d 749, 759, 760 (C.A. 1959).

> "Such secret inspections for the purpose of obtaining evidence for a litigation have been frowned upon by courts of Admiralty and they are accorded diminished weight." *Frederick Snare Corp.* v. *Moran Towing & Transp.*, 195 F.Supp. 639 (S.D.N.Y. 1961), 1961 A.M.C. 2605, 2610, and numerous cases cited therein.

The evidence by Intalco and McDowell fails to explain why the accident did not happen until 15 minutes after

the boom was secured, and fails to exclude the probability that the activation of the boom motor may reasonably be attributed to other causes than the failure of Williams to press the "stop button."

It is uncontroverted that 15 minutes elapsed between the securing and the falling of the boom. Intalco and McDowell failed to submit any evidence to contradict this statement and Intalco's log that the boom was secured at 1650 hours or Cramer's testimony that the boom was secured at 1650 hours. All parties agreed that the boom fell at 1705 hours.

The evidence failed to explain how the accident could have occurred 15 minutes after the boom had been secured. No evidence was submitted to contradict the testimony of Intalco's expert, Lupton (473, 474), or Bellingham's expert, Fikse (691), that the entire cycle of unwinding and rewinding the cable on the motor would be completed in 7.43 minutes. The time of said cycle was readily and exactly computable from the speed of the constant speed motor which rotated the drum.

This 7.43-minute cycle is a fact and not a "theory."

Had Williams not pressed the "stop" button after booming up, the accident would necessarily have had to occur within 7.43 minutes of 1650 hours; and this clearly proves that Williams pressed the "stop" button and did not leave the motor running when he secured the boom at 1650.

Had the "stop" button not been pressed the slackening cable would have been immediately and inescapably noticed by Williams when he tested the hand lever which operates the dogs, and would have been immediately and inescapably noticed by Williams when he returned to the motor room and set the hand brake.

Furthermore, the activation of the boom motor could reasonably have been caused without any human intervention by a short circuit and/or by the activation of the "down" motor starter after the boom *had* been properly secured by Williams, as was testified to by McDowell's experts Engineer Thomas Sporting (663) and Walker (590). Furthermore, McDowell's expert Ishma Mozingo, an electrician, testified (498, 499) to damage to the electrical circuiting; that the wiring and lights on the boom were off and that the connections to the cab and the boom controls had to be required. This witness further admitted that he did not check into the short circuiting and lowering of the boom and conceded that there are short circuits which do not leave evidence of short circuiting (504).

The trial court, unfortunately, insisted on post-trial briefs limited to the question of charterer's damages (R 153). It was not until the argument of the motion for reconsideration of the court's decision that the implications of the time lapse between securing the boom and the collapse of the boom versus the time lapse for unspooling and rewinding the cable on the drum, that the implications were forcefully brought home to the trial court.

At the argument of that motion, counsel argued strongly that the accident could not have occurred as contended by Intalco inasmuch as 15 minutes had elapsed between the time the boom was secured and the boom fell, while the complete sequence for unspooling and rewinding the cable would take a total of only 7.43 minutes. This colloquy is reported on pages 7-8 of the transcript as follows:

> "Mr. Zinn: How do you explain the time element, your Honor?
>
> "The Court: I think these times were approximate. I think unquestionably they were approximate. They

could not have been exact: If I am bound by the times that are stated in the pretrial order, and it does say that at 1705 the number two hatch was damaged by the falling of the crane—where is the other time?

"MR. ZINN: The other time is in Mr. Cramer's deposition testimony taken from the Intalco log.

"THE COURT: The times must be wrong or the operation was slowed down by this one cable that wrapped itself or got twisted around the shaft.

"MR. ZINN: Isn't your Honor making an assumption upon which there is no evidence?

"THE COURT: What assumption am I making?

"MR. ZINN: That these times must be wrong. According to Mr. Cramer's testimony the boom was already up because he talked to Guy Williams and asked him, 'Why did you raise the boom?' and that was before five o'clock.

"THE COURT: Proceed."

The court, apparently, was willing to make either finding to hold Williams negligent, although neither is supported by the record. He would either find that the times were approximate or that the twisting of the one cable resulted in a greater period of time for the unspooling and rewinding sequence.

In light of this inability of the trial court to make a sustainable finding on this question, the court's holding that Williams' testimony was inconsistent with uncontroverted physical facts must fall. This court on appeal must arrive at the conviction that a serious mistake was made in the findings by the court below, and that the conclusion of the trial court that Williams was negligent is "clearly erroneous."

Other likely causes of the accident than the negligence of the operator were not excluded by the evidence. The

boom motor could reasonably have been activated by either a short circut or the excessive swaying and vibration of the crane in the severe gale-force winds described by Intalco's chief engineer, Cramer, which had forced him to go home at 1700 hours after the boom had been properly boomed up, latched, and secured at 1650 hours (193-195).

Where various possible causes of an accident exist and not all of them can be attributed to the party charged, there is a failure of proof.

As stated by the court in *Lamb, et al* v. *Interstate Steamship Co., et al.*, 149 F.2d 914, 916 (C.A. 6, 1945):

> ". . . if the injury complained it might well have resulted from one of many causes, it is incumbent upon the libelant to produce evidence which will *exclude* the operation of those causes for which the Master or the crew was under no legal obligation. If the cause of the injury may be as reasonably attributed to an act for which the Master and the crew is not liable as to one for which they are, libelant has not sustained the burden of fastening tortious conduct upon the Master or crew. The evidence showing negligence must come from witnesses who speak as knowers, not as guessers." See also *Commercial Molasses Corp.* v. *New York Tank Barge Corp.*, 314 U.S. 104, 112 (1941); *Home Ins. Co.* v. *N.P.R. Co.*, 18 Wn.2d 798 at 803, 804, 140 P.2d 507 (1943); *Gardner* v *Seymour*, 27 Wn.2d 802, 808-811, 180 P.2d 564 (1947). (Emphasis supplied)

Considering that the burden was on Intalco to prove that Williams negligently caused the boom to fall, the court's statement that Bellingham's proof of possible causes of the fall of the boom other than from the operator's negligence was "speculative" was misdirected.

It is respectfully submitted that the court's said finding should have been directed to the speculative and theoretical "proof" submitted by Intalco and McDowell.

Intalco and McDowell's "proof" was contradicted forcefully by Williams' testimony that he pressed the "stop" button and conclusively contradicted by the factual impossibility of the accident's happening 15 minutes after the boom was secured.

It is respectfully submitted that the trial court erred in holding that Williams' testimony was contradicted by "uncontroverted physical facts."

The trial court should have found that the plaintiffs had failed to establish by a preponderance of the evidence that the defendant was negligent and that such negligence was the proximate cause of the damage to plaintiffs' property.

The crane was not safe. Intalco's chief engineer, Cramer, supervised the engineering and approved the design drawings of the crane (167) and did more engineering on the crane than anyone else outside of McDowell and Bechtel (173) despite the fact that he had no prior experience in design and specifications of cranes (207).

It had been in operation but nine months prior to the accident, the first acceptance test having been performed in March, 1966 (173). During its brief operation it had broken down many times.

On one occasion the electric brake failed during the lowering of the boom and the motor burned out (191).

On one day, the day of the accident, a pin broke in the bucket at 1100, a payloader was placed in No. 2 hold at 1130, the belt on the cross-feed stopped at 1510 and was down for 35 minutes. The conveyor was again stopped at 1635, this time because of the silo belt (193).

For some time after the motor burned out, the crane was operated without an electric brake on the motor, and Cramer admitted (228):

> "A. Yes. *They should always have helped because this thing at this time was dangerous and could have run away.*"

Nevertheless Intalco did not hesitate to operate the crane for months in its admitted dangerous condition.

The crane had no effective limiting device to prevent the complete unspooling of the wire on the drum.

Cramer admitted (210):

> "Q. Well, let me state it this way: Suppose that on the existing system of controls that you have, that you had on December first, 1966, the operator was in the process of lowering the boom from vertical to horizontal position He had pressed the Down button and the boom is traveling down to the horizontal. The operator has a heart attack. Is there anything thing from rewinding and going back up to the vertical?
>
> "A. No, there's not.
>
> "Q. And causing exactly what happened here to happen?
>
> "A. No, there is not anything.
>
> "Q. There are devices that could be used, such as a dead man control I'm referring to, to prevent this, are there not?
>
> "A. Yes, there are."

and Intalco's and American Metal's expert, Lupton, testified and admitted (482):

> "Q. So that if the crane did in fact operate the way Mr. Cramer said it did (210 above quoted) then it

would not be a safe, proper or standard crane, is that right?

"A. Yes, assuming that this device is not in there."

There were other defects in the design of the crane.

While there was a safety control which stopped the boom (in its upward travel near a vertical position) at a point just below the dogs and which required the momentary and simultaneous pressing of the "by-pass" and "up" buttons to elevate the boom into and above the dogs, *there was no safety control on the crane which required the momentary and simultaneous pressing of the "by-pass" and "down" buttons to lower the boom* the short distance from a position in or above the dogs to point a foot or below the dogs (319, 320, 355).

Such a safety control could have been easily, quickly, and inexpensively installed and would have prevented the accident herein.

The crane involved in the accident was negligently designed and equipped and disregarded the standards established by the National Safety Council and even minimal standards of safety.

The National Safety Council, a federally chartered corporation incorporated by Act of Congress August 13, 1953, in its *Manual of Accident Prevention for Industrial Operations* (6th Edition) with specific reference to "fail-safe" or "dead-man" controls on cranes states (p. 539):

"Each controller and operating lever should be marked with the motion it controls and its direction. These levers should have spring returns so that they will move automatically into the 'off' position and latch themselves there if the operator releases the handle."

The crane herein had no spring return which would automatically return the system to the "off" position or latch itself there when the crane was not being operated.

The crane even lacked *momentary safeguards* with which other McDowell cranes were equipped (511, 512), which would have required the momentary and simultaneous pressing of the "by-pass" and "down" buttons to lower the boom, a matter of but a few feet from the dogs or safety latches, and which would have required only seconds of operation (522, 523, 524, *supra*).

The crane involved herein lacked the safeguards with which two-thirds of the cranes were designed by one of McDowell's witnesses (650-651).

The trial court's decision incorrectly assumed, contrary to the National Safety Council standards, that it was unnecessary to equip a crane with fail-safe controls, even though it held that such controls "might have prevented the accident."

The National Safety Council's recommendations and standards go much further than those argued by Bellingham in this case and hold that *"special considerations must be given to human factors"* stating (pp. 90, 91):

> "When safety is being designed into machines and equipment, *special consideration must be given to human factors.* Almost every machine requires an operator, and the mechanisms of many machines have become too complex to be understood by the average operator. Therefore, machines and equipment should be designed in terms of human limitations and capabilities, both mental and physical. Also see the next chapter, 'Human Factors Engineering.'

* * *

"Advance analysis: If there are any defects in the design of a piece of machinery, it is usually only a matter of time before some operator fails and an accident ensues. Therefore, *all possible faults in the design of equipment and all possible hazards in the work area of a machine, as well as the physical and mental capabilities of the operator, should be studied in advance for the purpose of* preventing accidents.

• • •

"A wide margin of safety should be provided to eliminate any possible situation that places the operator near his maximum ability with regard to aptitude or effort, especially when adverse factors enter the picture."

The crane herein disregarded even the minimum standards of safety argued by Bellingham.

The courts are increasingly adopting the philosophy of its National Safety Council: an industrial accident caused by human fallibility if reasonably preventable by technology is legally foreseeable and the manufacturer who fails to design such preventive devices into his product is culpable.

In *Larsen* v. *General Motors,* 391 F.2d 495 (C.A. 8, 1968), the court, after citing National Safety Council Statistics at page 502 of its opinion, stated with respect to safety design in motor vehicles at page 503:

"We perceive of no sound reason, either in logic or experience, nor any command in precedent, why the manufacturer should not be held to a reasonable duty of care in the design of its vehicle consonant with the state of the art to minimize the effect of accidents. The manufacturers are not insurers but should be held

to a standard of reasonable care in design to provide a reasonably safe vehicle in which to travel."

Frumer-Friedman in their standard work on *Products Liability*, state in Vol. I, §702 at page 115 as follows:

"Moreover, a manufacturer should incur responsibility for foreseeable injuries caused by dangers which were appreciated but momentarily forgotten at least where it is feasible to install a safety device to eliminate the danger."

By failing to install a fail safe switch, a common device, the crane was unsafe as designed, and the trial court adopted an erroneous legal standard in absolving McDowell-Wellman & Company.

Subsequent to the filing of briefs and submission of oral argument in the Circuit Court, the Court of Appeals of the State of Washington, in *Lamphiear* v. *Skagit Corp.*, 6 Wn. App. 350, 493 P.2d 1018 (1972), had occasion to rule upon the liability of the manufacturer of a crane for failure to design the crane with sufficient safety devices to render it safe to operate.

One of the claimed design defects which the court approved for submission to the jury was the failure of the manufacturer to install warning devices which would advise the operator of the crane whether or not the crane was in proper operating condition (specifically, flags or markers to indicate when and if the crane boom was fully extended and locked into place. 6 Wn. App. 354, 493 P.2d at 1021).

The court approved the following jury instruction stating the law with respect to this claim:

"A manufacturer of a portable spar tree to be used as a yarding tower is liable in damages where it has

been proved by a fair preponderance of the evidence that;

"(1) A manufacturing defect existed;

"(2) The defect rendered the product unreasonably dangerous; and

"(3) Such defect was a proximate cause of plaintiff's damages.

"Where such a defect is proved, liability exists even though the manufacturer has exercised all possible care in the manufacture of the product."

6 Wn. App. 352, 493 P.2d at 1020-1.

The trial court in the instant case did *not* find that there was not a defect in the manufacture of the crane, but found that it was excusable not to install the simple, inexpensive safety switch on the "Stop" button, because such a device was sometimes "defeated" by crane operators. The proposition that a possible future act of negligence could excuse negligence in design of the crane is a unique one that cannot be supported by common sense or law.

The "fail-safe" switch itself is a switch or button that automatically returns to a neutral or off position when the operator leaves the station, thus such a switch on the down mode of the "Stop" button, would have absolutely prevented the entire casualty if McDowell-Wellman had installed it. (R. 380; Appelalnt's Brief pp. 29-36).

The court in *Brooks* v. *Allis Chalmers Mfg. Co.,* 163 Cal App.2d 410, 329 P.2d 575 (1958), held at page 414 that defendant's liability for negligent design of a crane was not necessarily cut off by the intervening negligence of the operator, if such negligence could be foreseen.

## POINT III

**Jebsens, the Time-Charterer, and American Metal Climax, the Voyager-Charterer, Cannot Recover Against Bellingham.**

Jebsens, as time-charterer, and American Metal Climax, as voyager-charterer, sought recovery against Bellingham for alleged damages sustained by them under their charter parties. Jebsens was a time-charterer under a charter party with the owner of the TROJA and American Metal Climax was sub-charterer on a voyage charter between it and Jebsens. Neither of these parties had any demise interest in the TROJA.

The District Court concluded in its opinion at page 9 that:

> "Jebsens, as time-charterer, has no direct right to recover against the tort-feasor of owner Wilhelmsen. *Robins Dry Dock & Repair Co.* v. *Flint,* 275 U.S. 303, 72 L.Ed. 290 (1927). However, Jebsens argues it should have subrogation rights and that it had a duty to pay or alternatively a payment was made in good faith by mistake of fact and law."

The District Court then concluded that Jebsens had a good faith doubt as to its liability for charter hire during the time when the vessel was prevented from working because of the accident and concluded that his belief, even though mistaken, would remove Jebsens from the category from a "mere volunteer" and allow subrogation to the TROJA's rights against Bellingham. The court did not discuss the theory on which American Metal Climax was permitted to recover.

It is submitted that this case is governed by the principle of *"res inter alios acta"* as it has been applied specifically to maritime cases where a party with less than a demise interest in a vessel seeks to recover its charter based damages against a *tort-feasor* who caused damage to the vessel.

In the case of *Robins Dry Dock & Repair Co.* v. *Flint*, 275 U.S. 303, 72 L.ed. 290 (1927), the Supreme Court held that a charterer whose charter was less than a demise had no cause of action against a *tort-feasor*. Not having a property interest in the vessel, or being in privity with the *tort-feasor*, the *tort-feasor* owed no duty to the charterer. On a more realistic basis, it can be seen that the *tort-feasor's* liability for loss of use of the vessel cannot be measured by the chance provisions in a charter party between the owner and a charterer or between a charterer and sub-charterer.

Taking the matter a further step, it is clear that the alleged damages or a substantial part of the damages claimed by Jebsens were not even damages at all, but appeared to be merely an accommodation made by Jebsens to the owner of the TROJA thus giving Jebsens no right by way of subrogation at all. *Nelson* v. *Sponberg*, 51 Wn.2d 371, 318 P.2d 951 (1957); *United Boat Builders Inc.* v. *Tempo Products Company*, 1 Wash. App. 177.

The complaints both of Jebsens and American Metal Climax should be dismissed; they do not state causes of action.

## CONCLUSION

Petitioner submits that this court should reverse the Judgment of the Circuit Court of Appeals Ninth Circuit, against Petitioner as to each prevailing party, and remand the case for Judgment in favor of appellant against the following parties on the following bases:

1. Against Intalco for the reason that the evidence fails to establish the negligence of appellant by a preponderance of the evidence.

2. Against William Wilhelmsen for the reason that the evidence fails to establish the negligence of appellant by a preponderance of the evidence.

3. Against Jebsens and American Metal Climax for the reason that, as a matter of law, these parties are not entitled to recovery against appellant.

4. For indemnity of appellant against McDowell Wellman, in the event any portion of Relief 1-3 is not granted, by reason of the defects and the inherent vice in the crane.

It is respectfully submitted that business litigants are as much entitled to the protection by the Federal Courts of their civil and constitutional rights as are oppressed minorities, recidivists or sovereign states, and that exclusionary concepts have no place in the Federal Court system, which is national and not regional in spirit and in fact; that the right of any litigant to be represented by counsel of its choice may not be limited or restricted by a court's predilection for or animadversion against counsel on the basis of whether such counsel is or is not indigenous to the community in which the court presides and the trial is

to be held. The Supreme Court should make this trumpet clear to all Circuit and District Judges in every state of the Union.

Respectfully submitted,

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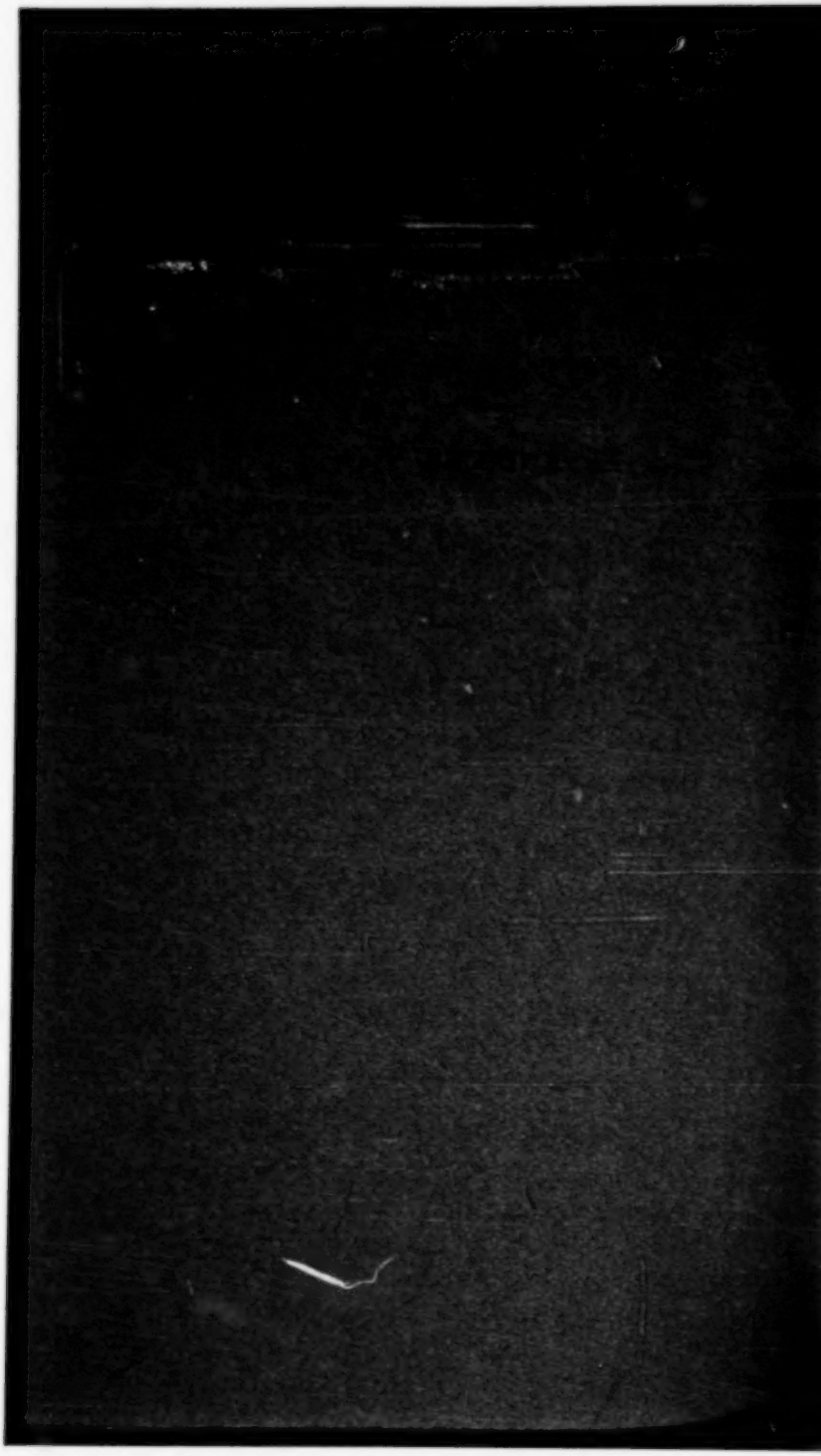

## APPENDIX A

### Opinion of the Circuit Court

UNITED STATES COURT OF APPEALS,

NINTH CIRCUIT.

Nos. 25551, 25552.

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DAMPSKIBSAKTIESELSKABET, etc., et al.,

*Appellees,*

—v.—

BELLINGHAM STEVEDORING COMPANY,

*Appellant,*

—and—

Intalco Aluminum Corporation, et al.,

*Appellees.*

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AMERICAN METAL CLIMAX, INC.,

*Appellees,*

—v.—

BELLINGHAM STEVEDORING COMPANY,

*Appellant,*

—and—

Intalco Aluminum Corporation, et al.,

*Appellees.*

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March 24, 1972.

Consolidated actions arising after crane fell on ship brought by ship owner and time charterer against stevedore and lessee of crane, in which manufacturer of the crane was impleaded as third-party defendant, and by voyage charterer against stevedore, in which lessee was

impleaded. The United States District Court for the Western District of Washington, William T. Beeks, Chief Judge, 306 F.Supp. 170, entered judgments against stevedore, and it appealed. The Court of Appeals, Choy, Circuit Judge, held that trial court's finding that stevedore's employee was negligent in failing to push stop button and engage manual brake on crane after leaving it at end of shift was not clearly erroneous even though the employee testified that he distinctly remembered pushing the button and engaging the brake.

Affirmed.

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Jacob A. Mikkelborg (argued), of Long, Mikkelborg, Wells & Fryer, Earle W. Zinn, of Lycette, Diamond & Sylvester, Seattle, Wash., for appellant.

Thomas J. McKey, Jr. (argued), of Bogel, Gates, Dobrin, Wakefield & Long, Martin P. Detels, Jr. (argued), of Detels, Draper & Marinkovich, John G. Bergmann (argued), of Elvidge, Veblen, Tewell, Bergmann & Taylor, Seattle, Wash., for appellees.

Before DUNIWAY, HUFSTEDLER and CHOY, Circuit Judges.

CHOY, Circuit Judge:

Bellingham Stevedoring Company appeals from a judgment of the district court, 306 F.Supp. 170, holding the appellant liable for damage caused by the negligence of an employee who was the operator of a crane unloading cargo off a ship. We affirm.

Thes hip, Troja, is owned by the partnership Wilh. Wilhelmsen which is composed of Dampskibsaktieselskabet Den Norske Afrika Og Australieline and other interests (Wilhelmsen). The Troja was chartered to both a time-

charterer and a voyage-charterer. At the time of this accident, the time-charterer was A/S Kristian Jebsens Rederi (Jebsens). The voyage-charter was Aluminum Metal Climax, Inc. (A.M.C.) whose plant was the destination of the bulk alumina cargo being unloaded at the time of the accident.

The crane involved in the accident was being leased, along with other dock facilities, by the Intalco Aluminum Corporation (Intalco). The machine had been manufactured and installed by McDowell-Wellman & Co. (McDowell). Pursuant to a stevedoring contract with Intalco, Bellingham Stevedoring Company (Bellingham) provided longshoremen crews, including a crane operator, to unload the Troja.

On December 1, 1966, crane operator Guy Williams was working the Troja on a shift which was scheduled to end at 6:00 p.m. High winds had been blowing all day causing the men to stop operations on at least one occasion in mid-afternoon.

Due to the high winds, Williams decided to shut down the crane before the end of the shift. His decision was also based on the fact that a repair crew was fixing the bucket lift, used to unload the bulk alumina. The longshoremen could not resume work until the bucket was ready.

At approximately 4:50 p.m., Williams brought the crane to a vertical position and set it into its cradle alongside the king-post. Normally, the boom would have been left in a horizontal position so that the next shift crew could begin work right away. This usual procedure was dangerout, however, because the winds would be likely to swing the boom uncontrollably. Soon after Williams left the winch control tower, the boom fell on the Troja, damaging both the ship and the boom.

*Appendix A*

Wilhelmsen and Jebsens sued Bellingham and Intalco; Intalco impleaded McDowell as a third party defendant. A.M.C. brought a separate suit against Bellingham and the latter impleaded Intalco. Each defendant claimed indemnity from the other defendants for whatever damages might be imposed.

After a consolidated trial (jury-waived), the district judge found that the sole cause of the accident was the negligence of Bellingham's crane operator, Guy Williams. On appeal, Bellingham challenges this factual finding. Bellingham also contends that the district judge erred in awarding damages to Jebsens and A.M.C. in subrogation for payments made to Wilhelmsen to cover the costs of delay.

The finding that Williams' negligence was the sole cause of the accident is a factual determination presumed by this court to be correct, unless "clearly erroneous." Rule 52(a), Federal Rules of Civil Procedure. "We cannot overturn a finding unless, after considering the entire evidence, we are left with the definite and firm conviction that a mistake has been committed." Soderhamn Machine Mfg. Co. v. Martin Bros. Container & Timber Products Corp., 415 F.2d 1058, 1060 (9th Cir. 1969).

Bellingham's challenge to the findings consists of two main pillars. First, Williams testified that he distinctly remembered pushing the "Stop" button and engaging the manual brake. Bellingham contends that the judge erred in disregarding this direct evidence and favoring instead the "speculation" of expert witnesses.

[1] The record indicates ample evidence to support the district judge's determination that Williams failed to do these two things. All parties agreed that the accident resulted from the winch drum moving in a "down" direc-

tion, unwinding and rewinding the cable until it snapped. Had the "Stop" button been pushed, there would have been certain physical consequences when the boom fell. For example, the drum would have been scarred and the brake would have been burned by the friction of the two pieces. Neither piece was so damaged. Also, the electrical circuits would probably have shorted. They did not. The hand brake is a ratchet type, the teeth of which would have been broken by the drum rubbing against the brake arm. After the accident, the ratchet teeth were in good condition and the brake lever was locked in a rest or unengaged position. Had the hand brake been in stop position, the drum would have been scarred and the brake would have been burned. As mentioned above, these indicia were conspicuously absent.

The second factual argument of Bellingham is that the accident could not have been caused by Williams' negligence because of a time problem. The argument runs thus: witnesses testified that it was approximately fifteen minutes from the time Williams left the winch control room until the boom was down; experts agreed that the winch drum would take 7.43 minutes to unwind and rewind; therefore, a different cause, probably the high winds, must have re-activated the motor and caused the winch to begin turning again.

[2] A review of the record convinces us that this argument must also fail. The fifteen minute figure was approximate only. Williams himself stated soon after the accident that he left the winch control room at 4:55 instead of 4:50, as shown in the log book. The 5:05 time entry in the log book was an observation that the boom was down, not that the boom actually fell at 5:05.

True, the experts agreed that the *normal* period for unwinding and rewinding the cable on the winch drum was 7.43 minutes. However, after the accident, much of the cable was discovered wrapped around the shaft which drives the winch drum. This shaft is much smaller in diameter than the drum itself. The drive mechanism would have had to make many more revolutions to rewind the cable, after it snagged on the shaft. It would have taken longer than 7.43 minutes for this to happen.

Based on the physical facts, the district judge found that, although Williams "may very well honestly believe that he pushed the stop button and set the hand brake, I am persuaded that he did not." Bellingham has failed to establish that the judge was clearly erroneous in his findings.

We now turn to Bellingham's argument that the district judge misapplied the law by holding that Jebsens and A. M.C. were entitled to subrogation. Jebsens paid Wilhelmsen for "demurrage," i. e., costs of delay, during the time that the Troja was still tied up at Intalco's dock. During this time, the boom was lying across one of the ship's holds. The damage which the hold sustained was not so bad that the cargo could not be unloaded. However, the Intalco dock was not set up with another crane.

A.M.C. paid for "demurrage" while the ship was being moved to and unloaded at another dock on the Columbia River.

Bellingham stipulated that the costs of delay were the direct and proximate result of the accident. It is clear that Wilhelmsen could have recovered demurrage from Bellingham, if the costs had not already been covered by Jebsens and A.M.C. However, Bellingham contends that Jebsens and A.M.C. were not obligated by the terms of

their charter parties to pay Wilhelmsen for the demurrage, and in paying, the charterers acted as volunteers, which disqualifies them from recovery in subrogation.

The district judge applied a different standard from that urged by Bellingham. Based on the terms of the charter parties, Jebsens and A.M.C. believed in good faith that they were obligated to pay demurrage. The district judge found that this belief was a reasonable interpretation of the terms of the charter-parties and that a reasonable good faith belief that one is obligated to pay is sufficient for application of the equitable doctrine of subrogation.

We agree. The good faith standard follows from the liberal policies behind the doctrine of subrogation. *Cf.* Credit Bureau Corp. v. Beckstead, 63 Wash.2d 183, 385 P.2d 864 (1963); In re Farmers' & Merchants State Bank, 175 Wash. 78, 26 P.2d 631 (1933). The parties have cited no Washington case specifically adopting this rule and we have found none, but the standards is not inconsistent with Washington law.

[3] Jebsens and A.M.C. were confronted with probable or possible liability. To protect their interests and to avoid the costs of defending a suit by Wilhelmsen, the charterers paid the shipowner. We hold that this good faith belief was sufficient to entitle them to subrogation rights against Bellingham for demurrage for which the latter was responsible. See Mosher v. Conway, 45 Ariz. 463, 46 P.2d 110 (1935).

Affirmed.

## APPENDIX B

### Opinion of the District Court

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

IN ADMIRALTY—No. 300

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DAMPSKIBSAKTIESELSKABET DEN NORSKE AFRIKA OG AUSTRALIELINE, WILHELMSENS DAMPSKIBSAKTIESELSKAB, A/S TONSBERG, A/S "TANKFART I, A/S TANKFART IV, A/S TANKFART V, and A/S TANKFART VI, d/b/a "WILH. WILHELMSEN," and A/S KRISTIAN JEBSENS REDERI,

*Plaintiffs,*

—vs.—

INTALCO ALUMINUM CORPORATION and BELLINGHAM STEVEDORING COMPANY,

*Defendants,*

McDOWELL-WELLMAN & Co., a corporation,

*Third Party Defendants.*

---

IN ADMIRALTY—No. 306

AMERICAN METAL CLIMAX, INC., a corporation,

*Plaintiff,*

—vs.—

BELLINGHAM STEVEDORING COMPANY, a corporation, et al.,

*Defendants,*

—and—

INTALCO ALUMINUM CORPORATION,

*Third Party Defendant.*

---

*Appendix B*

The captioned actions arise out of the same casualty and were consolidated for trial and all other purposes. The Court has jurisdiction over both actions under 28 USC 1333.

In Number 300 the partnership Wilh. Wilhelmsen, composed of Dampskibsaktieselskabet Den Norske Afrika og Australieline, Wilhelmsens Dampskibsaktieselskab A/S Tonsberg, A/S Tankfart I, A/S Tankfart IV, A/S Tankfart V, and A/S Tankfart VI (Wilhelmsen), owner of M/S TROJA and A/S Kristian Jebsens Rederi (Jebsens), time charterer of TROJA, brought action against Intalco Aluminum Corporation (Intalco), lessee of a dock, including the crane thereon, at Ferndale, Washington, used by Intalco for the discharge of bulk alumina, and Bellingham Stevedoring Company (Bellingham), who supplied the operator of the crane pursuant to a stevedoring contract with Intalco, for damage sustained when the crane boom fell upon TROJA. McDowell-Wellman & Co. (McDowell), who designed, manufactured and supervised the installation of the crane on Intalco premises, was impleaded as a third party defendant.

In Number 308, American Metal Climax, Inc. (American Metal), voyage sub-charterer of TROJA, brought action against Bellingham for damage sustained when the crane boom fell upon TROJA. Intalco was impleaded as a third party defendant.

Intalco crossclaimed against Bellingham and McDowell to recover crane repair costs.

Bellingham claims indemnity from Intalco and/or McDowell for whatever damages may be allowed against Bellingham.

Intalco claims indemnity against Bellingham and/or McDowell for whatever damages may be allowed against Intalco.

*Appendix B*

McDowell claims indemnity from Bellingham for whatever damage Intalco and/or American Metal may recover against McDowell.

On December 1, 1966 TROJA was discharging bulk alumina while moored to Intalco's dock. The discharge of the alumina was being accomplished by the use of Intalco's dock crane which was being operated by Bellingham under a stevedoring contract with Intalco. At 1705[1] hours TROJA's number two hatch was damaged when the crane boom fell upon TROJA.

The crane operator, an employee of Bellingham, had topped the crane boom and left the crane tower at 1650.[2] The operator normally would have left the crane in the horizontal position so the next shift could immediately begin work, but because of the high wind condition (gusts up to 50 m.p.h.) he decided that it would be safer if the crane was raised to the vertical position. While on his way off the pier the operator received word the boom had fallen upon TROJA. No one else had operated the crane in the interim.

The Intalco crane required a skilled operator. Certain specific steps were to be followed by him when topping the boom:

(1) Put the bucket and the bucket carriage into the hopper;

(2) Slack the hoist and the close cables (wireropes);

(3) Release the hand brake in the motor control room);

(4) Proceed to the boom control bridge and push the up button, which raises the boom until a limit switch

---

[1] Time approximate and not precise.

[2] Time approximate and not precise.

automatically stops the boom just below the safety latches, dogs);

(5) Push the bypass switch, which raises the dogs so the boom can pass, and the up button simultaneously;

(6) Push the stop button when the boom is above the dogs;

(7) Push the down button to lower the boom into the dogs;

(8) Push the stop button;

(9) Check the dog release lever tension to insure the boom is secure in the dogs;

(10) Return to the motor control room and set the hand brake;

(11) Shut off the motor generator.

The crane operator claims to have completed all steps except 11, which he omitted because he thought the mechanics working below on the conveyor belt needed the power. The motor generator was the main power source for the crane. Undeniably if the boom was secure in the dogs and the motor generator had been shut off, the accident could not have happened.

When the boom was lowered into the dogs, pressing of the stop button would have set an electric brake and stopped the motor shutting down the apron hoist drum.[2] However, the physical evidence shows that the apron hoist drum continued to turn in a downward direction

[2] While the operator was required to push the stop button, his failure to do so might not be critical under the normal situation since his shutting off the motor generator would also stop the drum from turning.

unspooling the entire amount of wire rope off the drum. As the drum continued to turn the wire rope began to randomly rewrap in a reverse direction. The wire rope wrapped around the drum shaft causing detachment of the lowering cam limit switch. One of the ropes snagged and was severed. The other rope continued to rewind raising the boom apron out of the dogs toward the king post. Since the apron hoist drum was turning in a downward direction the upper cam limit switch was inoperative. The wire rope, strained by the revised torque when wrapped around the drum shaft, drew taut and severed as the boom apron was crushed against the king post. When the wire rope severed there was a spring release action and the boom was catapulted from its vertical position against the bumper on the king post. As the boom fell it disintegrated the dogs and snapped the eye bars which normally hold it in the horizontal position. The boom landed on the number two hatch of the TROJA damaging both the ship and the crane.

As indicated, if the stop button had been pushed an automatic brake would have operated on the apron hoist drum, preventing the turning of the drum. If the hand brake had been set, it also would have operated on the apron hoist drum slowing, probably stopping, the drum from turning. Immediately following the accident the hand brake was found jammed in an open position with no damage to the ratchet. Further inspection indicated no burning or other damage to the brake drum, which would be normal if the brake had been set and the drum was turning against it.

I'm convinced from the great weight of the evidence and the uncontroverted physical facts that this accident resulted solely from the crane operator's negligence. The operator admits he failed to turn off the motor generator

and while he may very well honestly believe that he pushed the stop button and set the hand brake, I am persuaded that he did not.

I find no merit in Bellingham's argument that the crane was defectively designed, constructed or installed by McDowell. The great weight of the evidence indicates no violation of the Washington Safety Standards or the standards in the industry. It was urged that McDowell should have provided the crane with "Dead Man" type of controls for raising and lowering the boom. While the existence of a dead man type of control might have prevented the accident, I entertain doubt.[4] What is clear is that the failure to provide a dead man type of control was not negligence nor was it a manufacturing defect. The crane was designed to be operated by a skilled operator and when properly operated the crane was not unreasonably dangerous. *Marker* v. *Universal Oil Products Co.*, 250 F.2d 603 (10th Cir., 1957).

Bellingham's argument that an electrical short in the switching mechanism could have reactivated the down button after the stop button had been pushed is also without merit. I suppose it is always true, when considering electrical equipment, that a short in the system might possibly cause unusual results. However, when weighing the uncontroverted physical facts, indicating no burning or other evidence of a short, against the mere possibility of a short, I find the shorting argument to be without evidentiary basis.

---

[4] There was considerable evidence indicating that when used, a "dead man" control was on many occasions defeated by the operator who did not like to stand with his finger continuously on the switch. The operator would either tie or wedge the switch down so that it would continue to make connection.

*Appendix B*

I find no merit in Bellingham's argument that the wind swayed the crane to such an extent that it possibly closed a contact within the motor starter which caused the drum to begin turning in a downward direction. The motor starter was a spring loaded horizontal contactor with a magnetic coil for closing contact and energizing. It was of the type used on high speed trolleys and in marine application, encountering velocity and vibration. The starter would not make contact unless the magnetic coil was energized by the switch or the spring was broken. An inspection indicated no repairs were necessary on the motor starter which is still being used in the crane and it is now operating with the same motor starter.

Bellingham made additional contentions relating to the time differential between topping and accident, holding power of the brake, drum phlange, sheaves, equalizing mechanism, safety hook latch, boom switching design, topping control design, and manual brake electrical interlock. After careful consideration of each contention, I find them to be speculative, and as Bellingham's other contentions, to be based on mere possibility without evidentiary basis.

I do not find Intalco at fault. Intalco was not in control of the crane at the time of the accident. Intalco did provide a safe berth in that both the dock and the crane were reasonably safe and not defective.

I have been urged to apply the doctrine of strict liability against McDowell. I do not find the crane to be in a defective condition or unreasonably dangerous to the user and thus the doctrine is not applicable. Restatement (Second) of Torts §402 A (1965). See *Ulmer* v. *Ford Motor Co.*, 75 Wn. 2d 537, 452 P.2d 729 (1969).

Thus, I find Bellingham responsible for the damages in the total amount of $143,527.06 as stipulated in section one of the Addendum to the Pretrial Order.

*Appendix B*

I also find Bellingham responsible for the overtime costs totalling $27,974.06 as stipulated in section two of the Addendum to the Pretrial Order. These costs were necessitated by the casualty and incurred in mitigation of further damage.

Section three of the Addendum to the Pretrial Order deals with two items of damage claimed by Wilhelmsen, the first being the loss of use during TROJA repairs and the second being the loss of earnings in the subsequent charter due to late delivery. As to the loss of use during the two day repair period, December 12 and 13, 1966, the proper measure of damage is the net earning of TROJA but for the detention. *The Narvick,* 1923 AMC 263. See McNair, Mocatta and Mustill, *Scratton on Charterparties and Bills of Lading,* 383, 384 (1964) and annotations therein. The testimony indicates that if TROJA had continued on the Jebsens time charter she would have earned $3,332.08 for two days. Had TROJA commenced a grain voyage from Columbia River to Japan during these two days she would have earned $4,445.17 for two days. On a subsequent time charter from Japan to Australia and back, the rate was such that $3,525.06 was earned for two days. In determining the fair value of the TROJA for the two day repair period I averaged the three figures, arriving at $3,767.43 as the net earning of TROJA but for the detention. No operating costs were saved during the two day period and thus $3,767.43 is the amount recoverable against Bellingham.

As to the loss of earnings in the subsequent charter, it was argued that the late delivery was not proximately caused by the Intalco crane damage in that unforeseeable crane breakdown at Alcoa and an electricians' strike were intervening causes. It was also urged that "Jebsens did

not dispatch its duty to mitigate and minimize damages while bringing the TROJA to the Alcoa dock." I find that the strike and the crane breakdown at Alcoa were foreseeable consequences of the original negligent act of Bellingham and were not unforeseeable intervening causes effecting the chain of causation. The mere fact that other forces have intervened between Bellingham's negligence and Wilhelmsen's injury does not absolve Bellingham where the injury was the natural and probable consequence of the original wrong and might reasonably have been foreseen. *Fosbre* v. *State*, 70 Wn.2d 578, 424 P.2d 901 (1967).

On the question of mitigation of damages the burden of proof is on the party asserting it. *Finberg Trading Co.* v. *Republic of China*, 220 F.2d. 844 (5th Cir. 1955); *Burr* v. *Clark*, 30 Wn.2d. 149, 190 P.2d 769 (1948). On the evidence before me Bellingham has not established by a preponderance of the evidence that Wilhelmsen could have avoided the strike or the Alcoa crane breakdown or have otherwise mitigated the damage. Thus I find Bellingham responsible for the $4,253.68 loss of earnings in the subsequent charter due to late delivery.

Section four of the Addendum to the Pretrial Order contains a claim by Wilhelmsen for $1,649.39 paid to the subsequent charterer, Yuasa, to reimburse him for carrying charges due to late issuance of bills of lading. I find these charges to be remote and speculative and thus not recoverable.

Section five of the Addendum to the Pretrial Order contains a claim by Jebsens for demurrage paid to Wilhelmsen for the period 1705 hours December 1 through 0125 hours December 4, 1966. Jebsens, as time charterer, has no direct right to recover against the tort-feasor of owner Wil-

helmsen. *Robins Dry Dock and Repair Co.* v. *Flint*, 275 U.S. 303, 72 L.Ed. 290 (1927). However, Jebsens argues it should have subrogation rights in that it had a duty to pay or alternatively the payment was made in good faith by mistake of fact and law. Bellingham and Intalco reply that Jebsens made payment as a mere volunteer in that the TROJA could have been declared 'Off Hire"[5] and thus no duty to pay existed. I need not decide whether the TROJA should have been declared "Off Hire." The evidence indicates, and the parties agree, that the damage to TROJA would not have prevented discharge of cargo had a crane been available at Intalco. Assuming arguendo, that Jebsens had no duty to pay demurrage to Wilhelmsen in that the TROJA could have been declared "Off Hire" during the period that full working of the vessel was prevented, I find that there was reason to have a good faith doubt as to the application of Clause 15 of the Charter Party and therefore Jebsens may have believed themselves bound to pay.[6] This belief, even though mistaken, would remove Jebsens from the "mere volunteer" category and allow subrogation to Wilhelmsen's rights against Bellingham. *Mosher* v. *Conway*, 46 P.2d. 110 (1935); 83 C.J.S. Subro-

[5] Clause 15 of the Wilhelmsen-Jebsens Charter Party reads: "That in the event of the loss of time from deficiency of men or stores, fire, breakdown or damages to hull, machinery or equipment, grounding, detention by average accidents to ship or cargo, drydocking for the purpose of examination or painting bottom, or by any other cause preventing the full working of the vessel, the payment of hire shall cease for the time thereby lost; and if upon the voyage the speed be reduced by defect in or breakdown of any part of her hull, machinery or equipment, the time so lost, and the cost of any extra fuel consumed in consequence thereof, and all extra expenses shall be deducted from the hire."

[6] See *The Hackney*, 152 Fed. 520, 522 (1903); and Stretch, I *Chartering of Ships*, 80.

gation §9, p. 607. See *Credit Bureau Corp.* v. *Beckstead*, 63 Wn.2d. 183, 385 P.2d. 864 (1963). Accordingly, I allow Jebsens recovery against Bellingham in the stipulated amount of $3,910.56.[7]

In reaching my decision with respect to liability I have been impressed by the testimony of Thomas Sparling, Homer Lupton and Robert Walker.

Other than as herein stated all claims/cross-claims for damages or indemnity are dismissed.

Taxable costs shall be assessed against Bellingham.

This Opinion shall constitute the Court's findings of fact and conclusions of law under FRCP Rule 52(a). Counsel for plaintiff may prepare a decree in accordance herewith and submit the same within fifteen days of the date hereof, giving ten days notice to all interested parties.

Dated this 28th day of October, 1969.

(Illegible)
United States District Judge

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[7] Paragraph 2(t), page 6 of the Admitted Facts in the Pretrial Order.

## APPENDIX C

### Excerpted From Martindale-Hubbell Law Directory 1961

EVANS, McLAREN, LANE, POWELL & BEEKS
1700 WASHINGTON BUILDING
SEATTLE 1, WASHINGTON

General Civil and Trial Practice, Corporation, Probate, Real Estate, Taxation, Insurance, Admiralty and Aviation Law

Telephone MAin 4-1700 Cable Address "EMBE"

MEMBERS OF FIRM

Robert H. Evans, born Genesee, Idaho, November 25, 1881; admitted to bar, 1906, Washington. Preparatory education, Public Schools; legal education, University of Washington (1904). Member Seattle, Washington State and American Bar Associations.

William G. McLaren, born Jasper County, Iowa, October 28, 1875; admitted to bar, 1902, Washington. Preparatory education, Grinnell College (A.B.); legal education, Iowa State University Law School. *Fraternities:* Phi Beta Kappa; Phi Delta Phi. City Attorney of Everett, Washington, 1906-1910; Assistant United States District Attorney, Western District of Washington, 1908-1912; Member of State Board of Law Examiners, 1926-1929. *Member:* Seattle (President, 1920), Washington State (President, 1936) and American (Member, Board of Governors, 1937-1940) Bar Associations; American Law Institute.

W. Byron Lane, born Latah, Washington, April 18, 1905; admitted to bar, 1927, Washington. Preparatory education, University of Washington; legal education, University of

Washington (LL.B., 1927). *Fraternity:* Phi Delta Phi. *Member:* Seattle, Washington and American Bar Associations.

George V. Powell, born Seattle, Washington, May 14, 1910; admitted to bar, 1935, Washington. Preparatory education, Princeton University (A.B., 1931); legal education, University of Washington (LL.B., 1934). *Fraternity:* Phi Delta Phi. *Member:* Seattle, Washington State and American Bar Associations.

William T. Beeks, born El Reno, Oklahoma, May 5, 1906; admitted to bar, 1931, Washington. Preparatory and legal education, University of Washington (LL.B., 1931). *Fraternity:* Order of the Coif. *Member:* Seattle, Washington State and American Bar Associations; The Maritime Law Association of the U. S.

Gordon W. Moss, born Mount Vernon, Washington, December 17, 1920; admitted to bar, 1948, Washington. Preparatory education, University of Washington (A.B., 1942); legal education, Stanford University (LL.B., 1948). *Fraternities:* Order of the Coif; Phi Delta Phi; Phi Beta Kappa. *Member:* Seattle, Washington State and American Bar Associations; The Maritime Law Association of the U. S.

William T. Jacobson, born Rugby, North Dakota, July 11, 1923; admitted to bar, 1950, Washington. Preparatory education, University of Washington (B.A., 1947); legal education, Northwestern Law School (J.D., 1950). *Fraternities:* Phi Delta Phi; Order of the Coif. *Member:* Seattle, Washington State and American Bar Associations.

Raymond W. Haman, born St. Maries, Idaho, January 22, 1927; admitted to bar, 1952, Virginia and Washington. Preparatory education, Whitman College; legal education, Washington & Lee University (LL.B., 1952). *Fraternity:*

Phi Delta Phi. *Member:* Seattle, Washington State and American Bar Associations.

Martin P. Detels, Jr., born Brooklyn, New York, June 18, 1923; admitted to bar, 1951, Virginia; 1952, District of Columbia; 1954, Washington. Preparatory education, Williams College (A.B., 1945); legal education, Georgetown University (LL.B., 1951). *Member:* Seattle, Washington State and American Bar Associations; Maritime Law Association of the U. S.

William J. Walsh, Jr., born Seattle, Washington, June 23, 1919; admitted to bar, 1946, Washington. Preparatory education, University of Washington (B.A., 1941); legal education, University of Washington (LL.B., 1943). *Member:* Seattle, Washington State and American Bar Associations.

ASSOCIATES

G. Keith Grim, born Lewiston, Idaho, November 23, 1924; admitted to bar, 1952, Washington. Preparatory education, University of Washington (B.A., 1950); legal education, University of Washington (LL.B., 1952). *Fraternity:* Phi Delta Phi. Assistant Attorney General, State of Washington, 1952-1957. *Member:* Seattle, Washington State and American Bar Associations.

Richard D. Bonesteel, born Seattle, Washington, May 26, 1931; admitted to bar, 1956, Washington. Preparatory education, University of Washington (B.A., 1953); legal education, University of Washington (LL.B., 1956). *Fraternity:* Phi Delta Phi. *Member:* Seattle, Washington State and American Bar Associations.

Frank W. Draper, born Seattle, Washington, June 12, 1929; admitted to bar, 1956, Washington. Preparatory education, University of Washington (B.A., 1951); legal

education, University of Washington (LL.B., 1954). *Fraternity:* Phi Delta Phi. *Member:* Seattle County and Washington State Bar Associations.

Donald P. Marinkovich, born Cathlamet, Washington, December 16, 1931; admitted to bar, 1959, Washington. Preparatory education, University of Washington (B.A., 1954); legal education, University of Washington (LL.B., 1959). *Fraternity:* Phi Delta Phi. *Member:* Seattle, Washington State and American Bar Associations.

David Wayne Gittinger, born Kellogg, Idaho, January 22, 1933; admitted to bar, 1958, Washington. Preparatory education, University of Washington (B.A., 1957); legal education, University of Washington (LL.B., 1957) and Northwestern

## APPENDIX D

### Order

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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No. 25551

DAMPSKIBSAKTIESELSKABET, etc. *et al.*,

*Appellees,*

vs.

BELLINGHAM STEVEDORING COMPANY,

*Appellant,*

and

INTALCO ALUMINUM CORPORATION, *et al.*,

*Appellees.*

---

No. 25552

AMERICAN METAL CLIMAX, INC.,

*Appellees,*

vs.

BELLINGHAM STEVEDORING COMPANY,

*Appellant,*

and

INTALCO ALUMINUM CORPORATION, *et al.*,

*Appellees.*

---

Before: DUNIWAY, HUFSTEDLER and CHOY, Circuit Judges.

Appellant's suggestions of rehearing en banc being inexcusably late, we decline to consider it.

HERBERT Y. C. CHOY
United States Circuit Judge

FILED
AUG 7 1972
EMIL E. MELFI, JR., Clerk

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-450

BELLINGHAM STEVEDORING COMPANY,
*Petitioner,*

vs.

DAMPSKIBSAKTIESELSKABET, *etc., et al.*,
INTALCO ALUMINUM CORPORATION and
AMERICAN METAL CLIMAX, INC.,
*Respondents.*

## BRIEF OF RESPONDENT DAMPSKIBSAKTIESELSKABET and A/S KRISTIAN JEBSENS REDERI IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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KRISTIAN JEBSENS REDERI

IN THE

# Supreme Court of the United States

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*Respondents.*

---

## BRIEF OF RESPONDENT DAMPSKIBSAKTIESELSKABET and A/S KRISTIAN JEBSENS REDERI IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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### JURISDICTION

Bellingham Stevedoring Company's statement of jurisdiction shows that its petition was filed too late, and that this court does not have jurisdiction.

The statute, 28 U.S.C § 2101(c), provides:

> "Any . . . writ of certiorari intended to bring any judgment or decree in a civil action . . . before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree."

The time allowed to Bellingham Stevedoring Company to apply for a writ of certiorari, measured from the day its petition for rehearing was denied, expired on September 11, 1972, a week before it filed its application in this court.

## REASON FOR DENYING THE WRIT

### The Petition for Writ of Certiorari Was Filed Too Late

The sequence of pertinent events, as shown in the petition, was as follows:

1972

| | |
|---|---|
| March 24 | Court of Appeals filed its opinion, judgment entered; |
| April 4 | Bellingham Stevedoring Company filed a timely petition for rehearing; |
| June 12 | Court of Appeals denied the petition for rehearing; |
| September 11 | 90-day period expired within which Bellingham Stevedoring Company was entitled to petition the Supreme Court for writ of certiorari; |
| September 18 | Bellingham Stevedoring Company filed its petition for writ of certiorari. |

Petitioner seeks review of the judgment of the Ninth Circuit Court of Appeals which was entered in March 24, 1972. That judgment would be the appropriate decision for review had the petition been filed on time. The court's *per curiam* opinion in *Julia Boylan v. United States of America*, 257 U.S. 614 (1921) is as follows:

> "Dismissed for want of jurisdiction, due to failure to apply for writ of error within the statutory period, which began with the date of the entry of the final judgment of the Circuit Court of Appeals, to which the writ of error issued, and not with date of the entry of the judgment in the District Court, under mandate of the Circuit Court of Appeals."

The ninety day period during which Bellingham Stevedoring Company could have filed its petition commenced on June 13, 1972, the day after the Court of Appeals denied the petition for rehearing (Rule 34, Rules of the Supreme Court of the United States). *Citizens' Bank of Michigan City v. Opperman*, 249 U.S. 448, 450 (1919) states:

> "Where a petition for rehearing is entertained, the judgment does not become final for purposes of our review until such petition has been denied or otherwise disposed of, and the three months' limitation begins to run from date of such denial or other disposition."

See also *Morse v. United States*, 270 U.S. 151 (1926), *Gypsy Oil Company v. Escoe*, 275 U.S. 498 (1927), *Federal Trade Com. v. Minneapolis-Honeywell R. Co.*, 344 U.S. 206 (1952) and *United States v. Adams*, 383 U.S. 39 (1966).

The suggestion of hearing *en banc* (Rule 35) which was submitted by Bellingham Stevedoring Company after the denial of its rehearing petition was not considered by the Court of Appeals and did not extend the time period in which to seek review. The order of the Court of Appeals states:

> "Appellant's suggestions of rehearing *en banc* being inexcusably late, we decline to consider it."

The final consideration on the merits occurred on June 12, when the Court of Appeals denied the rehearing petition.

## CONCLUSION

The Petition for Writ of Certiorari was not filed within the time required by law. It should be denied.

Respectfully submitted,

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October, 1972

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-450

BELLINGHAM STEVEDORING COMPANY,
*Petitioner,*

—v.—

DAMPSKIBSAKTIESELSKABET, *etc., et al,*
INTALCO ALUMINUM CORPORATION and
AMERICAN METAL CLIMAX, INC.,
*Respondents.*

## BRIEF OF RESPONDENTS INTALCO ALUMINUM CORPORATION AND AMERICAN METAL CLIMAX, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

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*Respondents.*

---

## BRIEF OF RESPONDENTS INTALCO ALUMINUM CORPORATION AND AMERICAN METAL CLIMAX, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

---

### PRELIMINARY STATEMENT

Respondents American Metal Climax, Inc. and Intalco Aluminum Corporation submit this Brief in Opposition to the Petition for Writ of Certiorari primarily to rebut the unwarranted attack made by Petitioner on the trial judge, who has himself no avenue for correction of the record.

### THE PETITION WAS NOT FILED IN TIME.

The Judgment of the United States Court of Appeals for the Ninth Circuit which Petitioner attacks was rendered on March 24, 1972. Petition for Writ of Certiorari, p. 1;

*Dampskibsaktieselskabet etc. v. Bellingham Stevedoring Company, etc.*, 457 F.2d 889 (1972).

A Petition for Rehearing was filed on April 4, 1972, within the time specified by Rule 40 of the Federal Rules of Appellate Procedure, and was denied by Order of the Court of Appeals on June 12, 1972, as correctly stated in the Petition.

Section 2101 (c) of Title 28, United States Code (Act of June 25, 1948, c.646, 62 Stat. 961, as amended) provides in pertinent part as follows:

> "§ 2101
>
> . . .
>
> (c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a court action . . . before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree."

The running of the ninety-day period was extended by the timely Petition for Rehearing, but began to run on the date of the Order Denying the Petition, and the date of entry of the Order denying the Petition controls as to the timeliness of the Petition for Certiorari. *Citizens' Bank of Michigan City v. Opperman*, 249 U.S. 448, 63 L.Ed. 701, 39 S.Ct. 330 (1919); *Gypsy Oil Company v. Escoe*, 275 U. S. 498, 72 L.Ed. 393, 48 S. Ct. 112 (1927); *Semble United States v. Healy*, 376 U.S. 75, 78, 11 L.Ed. 2d 527, 84 S. Ct. 553 (1964).

The Order Denying the Petition for Rehearing having been rendered on June 12, 1972, the ninety-day period for application for Certiorari expired on September 11, 1972.

Petitioner's position is not assisted by reason of its having filed a "Suggestion of Hearing En Banc" in the Court of Appeals on June 23, 1972, after denial of the Petition for Rehearing and issuance of the Court of Appeals mandate. The Court of Appeals, by Order entered on August 7, 1972,

declined to consider the Suggestion as being "inexcusably late." In *Federal Trade Commission v. Minneapolis-Honeywell R. Co.*, 344 U.S. 206, 97 L.Ed. 245, 73 S.Ct. 245 (1952), the Judgment of the Court of Appeals was entered on July 5. Thereafter, after expiration of the time for filing of a Petition for Rehearing the Commission filed a Memorandum asking for correction of the Judgment, and a corrected Judgment was entered on September 18. The Petition for Certiorari was filed on December 14. This Court dismissed the Petition, as not timely filed, holding that the Judgment of July 5, which was not modified in any respect material to the issues sought to be raised in the Supreme Court, by judgment entered on September 18, started the running of the ninety-day period.

## STATEMENT IN REPLY TO POINT I

### Summary

**Petitioner did not designate Mr. Otto "to act as chief counsel" in the trial court. It did not contend in the Court of Appeals that the District Court Judgment should be reversed because it was denied representation by counsel of its choice. There is no constitutional right to representation in a civil case by non-resident, non-admitted counsel.**

### Petitioner Did Not Designate Mr. Otto As Its "Chief Counsel"

The Petition states that petitioner "designated Samuel C. Otto . . . to act as chief counsel"; that the Court "was incensed at the appearance of [Mr. Otto and his two assistants]"; and that the District Court "incredibly refused to permit him to act as chief counsel. . . ." (Petition p. 3)

Petitioner displays a reckless lack of candor in making those assertions. If, in fact, petitioner had designated Mr.

Otto as its chief counsel, no one ever so informed the District Court or the other parties.

Petitioner reproduces on page 4 of its Petition, remarks of the District Court with respect to the participation of Mr. Otto and his assistants. It carefully omits the portion of the transcript which immediately preceeds the quoted material. We supply this omission as follows:

> "MR. ZINN: Your Honor, before we proceed further may I address the Court?
>
> "THE COURT: Yes, you may.
>
> "MR. ZINN: Will you gentlemen come forward please. I would like to present to the Court and to counsel three gentlemen members of the bar of the State of New York and the various district courts in that state. Mr. Henry E. Otto, Mr. Theodore P. Daly and Mr. Samuel Otto. All of these gentlemen are associated with the firm of Richard T. Graham, and I move for their association as co-counsel in this case. Presently I think Mr. Samuel Otto will be the only one taking an active participation.
>
> "THE COURT: And what active participation will he take?
>
> "MR. ZINN: He may cross-examine some of the expert witnesses, your Honor." (Tr. p. 4)

In other words, the planned participation of Mr. Otto was the cross-examination of some of the expert witnesses. He did so (Lupton, Tr. p.470; Walker, Tr. p.571). He also conducted direct examination of one witness without objection or comment from any one (Duncan, Tr. p.694).

The remarks of the District Court which Petitioner characterizes as "incredible and offensive" must be placed in context. The Court was commencing a relatively simple three-day non-jury trial. There were four litigants—all of whose interests were adverse by reason of cross-actions. Plaintiffs Jebsens and Wilhelmsen were represented by one

lawyer; Intalco and American Metal Climax were represented by one lawyer; McDowell-Wellman was represented by two lawyers; and Bellingham came into District Court with four lawyers. We submit that the District Court was understandably surprised at the number of counsel which Bellingham thought necessary for the protection of its interests—particularly so when he had just been informed that of the total of four counsel, only two would participate actively in the courtroom, and that the participation of one of those two would be extremely limited. We further submit that the District Court was justifiably concerned that the proceedings might be unreasonably delayed, if Bellingham counsel held "committee meetings" at frequent intervals during the trial.

Finally, we invite the Court's attention to the following portion of the trial Transcript, at the conclusion of trial. (p.753)

> "THE COURT: . . .
>
> And I want to say to New York counsel who are here, and I haven't said this in many years to outside counsel, that it has been a real pleasure having you here. I regret that there was any reluctance in my mind about it at the start, and you are welcome to come back at any time.
>
> MR. OTTO: Thank you very, very much, Judge."

**Petitioner Did Not Present This Contention in the Court Below**

The contention of denial of the right to counsel of its choice, which is now argued as requiring the issuance of a Writ of Certiorari, for denial of a "fundamental", "constitutional" right, was not deemed significant enough by Petitioner to present to the Court of Appeals.

Petitioner's Brief as Appellant in the Court below stated five questions under "Statement of Issues", and stated nine points under "Specification of Errors". Denial of the right

to counsel is not urged as an "Issue" or assigned as a "Specification of Error".

The general rule is that "questions not raised or passed on below will not be considered by the Supreme Court on review. . . ." 32 Am. Jur. 2d 768, § 297. See also *McCullough v. Kammerer Corporation, et al,* 323 U.S. 327, 89 L.Ed. 273, 65 S.Ct. 297 (1945).

**There Is No Constitutional Right To Representation By Non-Resident, Non-Admitted Counsel**

In *Thomas v. Cassidy,* 249 F.2d 91 (4th Cir. 1957) the District Court had refused a non-resident, non-admitted attorney permission to appear *pro hac vice.* An appeal was taken from the order denying permission. The Court of Appeals held as follows:

> "It is well settled that permission to a nonresident attorney, who has not been admitted to practice in a court, to appear pro hac vice in a case there pending is not a right but a privilege, the granting of which is a matter of grace resting in the sound discretion of the presiding judge." (249 F.2d at 92)

This Court denied certiorari. 355 U.S. 958, 78 S.Ct. 544 (1958).

**STATEMENT IN REPLY TO POINT II**

Under Point II, Bellingham urges that there was no credible evidence to support the finding of the trial Court that Bellingham was negligent.

The Court of Appeals affirmed the trial court's finding in that respect (Appendix A to the Petition, p.6.a) and stated there was "ample evidence" to support the trial court's determination that Bellingham's employee had failed, directly contrary to the operating instructions given

to him, to either push the "Stop" button or engage the manual brake. (Appendix p. 4a)

In *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 69 S.Ct. 535, 70 S.Ct. 854 (1949) the Court stated:

> "A court of law, such as this court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of very obvious and exceptional showing of error." 336 U.S. at 275

In the light of this well-established principle, we do not undertake to review the voluminous evidence which both lower courts found supported the finding that Bellingham was negligent, nor to refute the statements made at pages 7-29 of the Petition.

We do wish to point out, however, that Bellingham's own expert witness, Duncan, had reported to Bellingham that:

> "The direct cause of the accident was the failure of the operator to press the stop button." (Duncan; Transcript—p.409).

Finally, defendant did not assign error below, and does not attack here, the District Court's finding of fact that Bellingham's employee was negligent in failing to shut off the motor generator. The District Court's finding on the issue was that Bellingham's employee had been instructed to shut off the motor generator, that he failed to do so and that the accident "could not have happened" if he had done so. (Opinion, Appendix B, pp. 11a-12a). This unchallenged finding alone precludes any justification for further review of the decision in this case.

## STATEMENT IN REPLY TO POINT III

American Metal Climax, Inc. plaintiff in Cause No. 308 in the trial court, was the voyage charterer of the vessel

TROJA, and the consignee of her cargo of bulk alumina. The casualty to the unloader crane at the Intalco dock "made it impossible to discharge the remaining cargo" of the TROJA at Intalco's premises.

American Metal therefore (as soon as the boom was removed from the deck of the TROJA to permit movement of the vessel) diverted the TROJA from Ferndale, Washington to Vancouver, Washington where discharge of the remaining cargo was completed on December 11, 1966.

The foregoing facts were agreed in the Pretrial Order in this case. Paragraph 2(e), (f), (k), (l), (m). (R.54-55)

It was further admitted by Bellingham that American Metal incurred and paid extra costs totalling $22,765.72 which costs were solely, directly and proximately caused by the falling of the unloader boom" and that each of the items comprising such costs was "fair and reasonable in amount". (Adendum to Pretrial Order; R. 143).

Bellingham's Petition does not specify wherein the Court below erred in allowing American Metal recovery of expenses conceded to be actually incurred and paid, fair and reasonable in amount, and proximately caused by its negligence, other than to say that American Metal was not a demise charterer.

It must be Bellingham's legal contention that, as a stevedore, it owes no duty of care or warranty of workmanlike service in unloading to a voyage charterer and cargo consignee. That, of course, is not the law. See e. g. *Sanderlin v. Old Dominion Stevedoring Co.*, 305 F.2d 80 (4th Cir. 1967).

*Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303, 72 L.Ed. 290, 48 S.Ct. 303 (1927) does not assist Petitioner. In *Robins*, a vessel while under repair under a contract between the owner and the yard was damaged by negligence of the yard and thus its return to service was delayed. Under the charter between the owner and Flint, a time charter-

er, the vessel would have been returned to Flint for the latter's use, on completion of repairs. Flint brought suit against the yard for loss allegedly sustained by it for loss of use of the vessel during the period of delay. The charter party provided that "the steamer was to be docked at least once in every six months, and payment of the hire was to be suspended until she was again in proper state for service." *Id.* at 307. Consequently, Flint had no liability to the vessel's owners for the delay, paid no hire or demurrage, and incurred no expense. In fact, the yard had settled the owner's claim against it. Under these circumstances, the Supreme Court said the charterer's "have no claim either in contract or in tort." *Id.* at 309.

That there is liability in this case seems obvious. The vessel owner's did not, as in *Robins,* release the tort-feasor; they brought suit against it. American Metal did not, as in *Robins,* seek to recover for its loss of use. Rather, American Metal sought to recover that which it was obligated to pay as a result of Bellingham's wrongful conduct, and which it in fact did pay. Unlike *Robins* the American Metal charter was in force and the vessel was in service under the charter at the time of Bellingham neglect or breach of warranty and American Metal's cargo was aboard.

## CONCLUSION

1. The Petition was not filed within the time provided by law.

2. Petitioner did not designate Mr. Otto as its "chief counsel". He participated in the trial to the full extent indicated to the trial judge at the beginning of trial and more. No contention that it had been denied its choice of counsel was presented by Petitioner to the Court of Appeals. In any event, there is no constitutional right to representation by non-resident, non-admitted counsel.

3. The concurrent findings of both lower courts that Bellingham's negligence was the proximate cause of the cas-

ualty was amply supported, and is not subject to review on certiorari.

4. American Metal, as voyage charterer of the TROJA and consignee of her cargo is entitled to recover its extra costs, which Petitioner had stipulated were "solely, directly and proximately caused by the falling of the boom," and were fair and reasonable in amount.

Respectfully submitted,

DETELS, DRAPER & MARINKOVICH
Martin P. Detels, Jr.